Office - Supreme Court, U. S.
FILED
JUN 15 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, A. D. 1944

No. 1286

Wisconsin Public Service Corporation,
Petitioner,

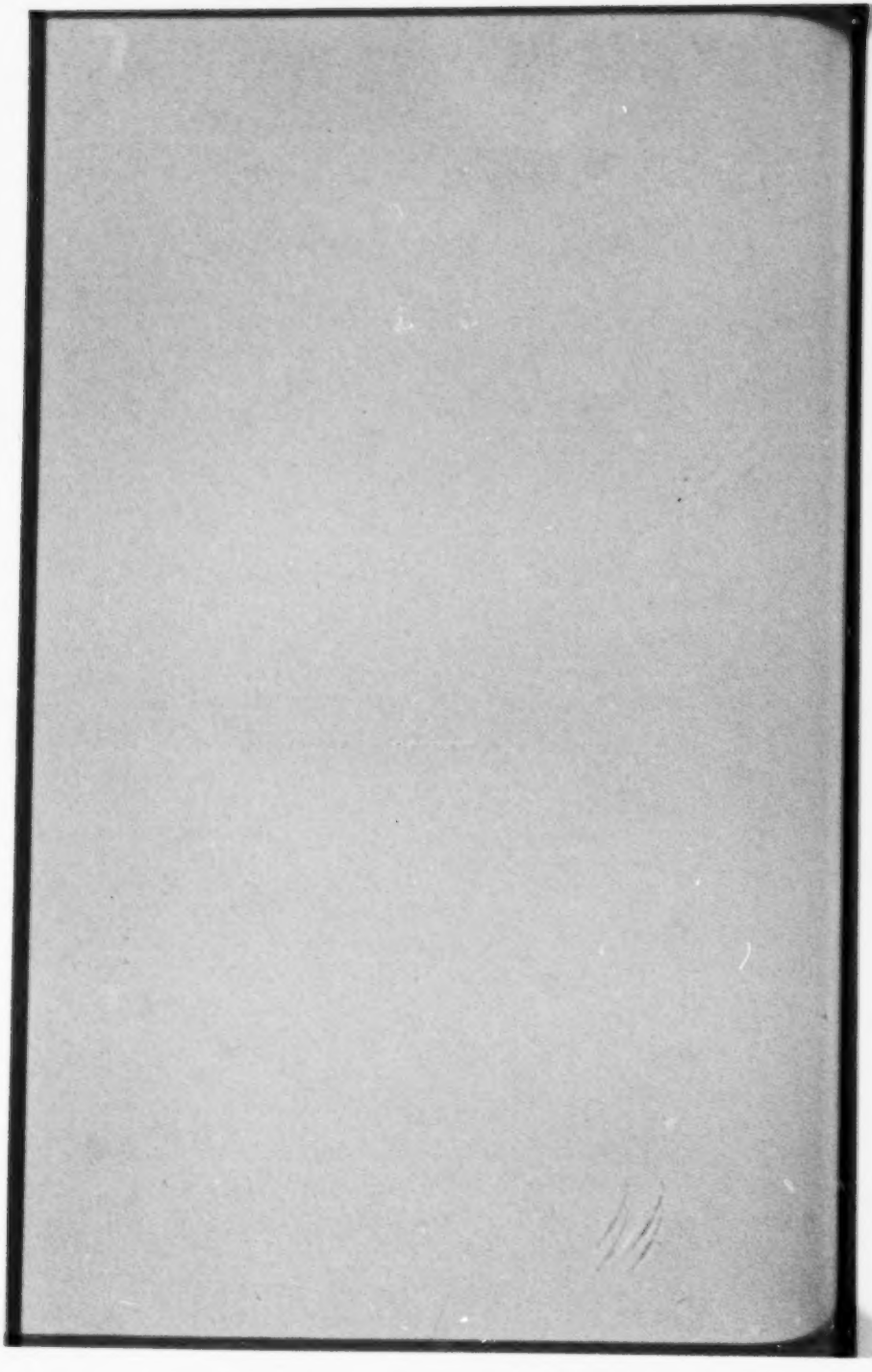
vs.

Federal Power Commission,
Respondent.

PETITIONER'S REPLY BRIEF

J. G. HARDGROVE,
BERT VANDERVELDE,
FRED W. GENRICH,
Counsel for Petitioner.

MILLER, MACK & FAIRCHILD,
Of Counsel.



IN THE

Supreme Court of the United States

October Term, A. D. 1944

No. 1286

Wisconsin Public Service Corporation,

Petitioner,

vs.

Federal Power Commission,

Respondent.

PETITIONER'S REPLY BRIEF

Counsel for respondent argue that the definition of navigable waters in the Federal Power Act is the same as the definition of navigable waters in the constitutional sense. If that is so, then more than two-thirds of paragraph (8) of Section 3 of the Federal Power Act is wholly superfluous, as it would have been sufficient if the definition were limited

to the first thirty-one words thereof, which end with the words "several States".

It is not a reasonable assumption that the remainder of Section (8) was added by Congress with the intention that it should add nothing to its definition of navigable waters.

Counsel for the Commission assert that the finding to be made by the Commission with respect to the interests of interstate commerce is necessary only in connection with streams which are not navigable waters of the United States. —in other words, waters over which Congress has no jurisdiction under its power to regulate interstate commerce.

This construction is untenable, in view of the language of Section 23 (b) of the Act, which requires first of all that the stream involved be one "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States." Congress has such power only where the stream is a navigable water of the United States. If the stream involved were not such a stream, then Congress would have no jurisdiction whatever.

Subsequent to the Rivers and Harbors Acts of 1890 and of 1899 States as well as others were precluded from obstructing navigable waters without appropriate permission. The references to States, therefore, in Section 23 of the Federal Power Act is quite natural. Persons, corporations and States having federal authority granted subsequent to the enactment of the Rivers and Harbors Acts referred to, and persons and corporations having State permits issued prior thereto, are all exempted from the operation of the Act.

It was perfectly natural for the States to exercise jurisdiction over navigable waters until the United States en-

tered the field. Upon entering the field it was not the intention of Congress that dams constructed under State license (with at least the tacit approval of the United States evidenced by its failing to enter the field, *United States vs. Rio Grande Dam and Irrigation Company,* 174 U. S. 690, at 704) should thereupon become unlawful. In fact, both the Rivers and Harbors Acts of 1890 and of 1899 referred to contemplated that the States would continue to grant licenses (26 *Statutes* 426, 454; U.S.C.A., Title 33, Sec. 401).

Lake Shore & Michigan Southern Railway Company vs. Ohio, 165 U. S. 365, 368.

It is admitted by counsel for respondent that "authorized by law" under the Rivers and Harbors Act of 1890 meant authorized by State law, but it is asserted that because the federal government entered the field of regulation similar language should be given a different meaning. Inasmuch as the practice and right of States to grant permits are of such long standing and so well recognized, the language granting an exemption and protection for structures under prior permits should not be so lightly regarded, especially in view of the discussion in Congress on the subject.

In 1920 the dam in question was a lawful dam, having been constructed pursuant to a State grant in 1887. When the Water Power Act of Wisconsin was enacted in 1915 the dam did not become an unlawful structure, and at the time of the enactment of the Federal Water Power Act in 1920 the dam qualified as a lawful structure under a permit granted prior to its enactment, if the term "permit" as used therein includes a permit from a State granted prior to the enactment of the Rivers and Harbors Act of 1890. The fact

that Wisconsin saw fit to impose conditions upon the repair and rebuilding of the dam does not militate against the fact that Congress did not intend to interfere with structures which were lawful at the time the Federal Water Power Act was enacted.

Respectfully submitted,

J. G. HARDGROVE,
BERT VANDERVELDE,
FRED W. GENRICH,
Counsel for Petitioner.

MILLER, MACK & FAIRCHILD
Of Counsel